



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, MWILU & KANTAI, JJ.A)

CIVIL APPEAL NO. 102 OF 2011

BETWEEN

AREVA T & D INDIA LIMITED.....APPELLANT

AND

PRIORITY ELECTRICAL ENGINEERS LIMITED.....1ST RESPONDENT

EMPOWER INSTALLATION CONTRACTORS LIMITED.....2ND RESPONDENT

(Being an appeal from the Ruling and Order of the High Court of Kenya at Nairobi (L. Kimaru, J.) dated 2nd September, 2009

in

H.C.C.C. No. 535 of 2009

JUDGMENT OF THE COURT

This is an appeal from the Ruling of the High Court (Kimaru, J.) dated 2nd September, 2009 in **High Court Civil Case No. 535 of 2009**.

The suit in the High Court was filed by the 1st respondent herein against the appellant as the 1st defendant and Empowering Installation Contractors Limited as the 2nd defendant.

The 1st respondent had also filed another suit, **High Court of Kenya Civil Case No. 538 of 2009** against the appellant as the 1st defendant and Ezetec Limited as the 2nd defendant.

The appellant is an Indian company which had entered into a contract with Kenya Power & Lighting Company for reinforcement and upgrading of electricity distribution network in Kenya. It had subcontracted some of its works to the 1st respondent, a Kenyan Company.

In both suits the 1st respondent claimed certain reliefs against the respective defendants for breach of respective sub-contracts. Both sub-contracts contained arbitral clauses and jurisdiction clauses thus:

“ARTICLE 25 – ARBITRATION

Any dispute arising out of or in connection with the Agreement shall be finally settled by way of arbitration in accordance with the Indian Arbitration Act, 1996 as modified from time to time.

The arbitration award shall be final and binding and not be subject to any appeal or revision.

The venue of the arbitration shall be at New Delhi, India.

ARTICLE 26 – JURISDICTION

The court of Delhi shall have exclusive jurisdiction”

In each suit the appellant filed an application under **section 6(1)** of the **Arbitration Act, 1995 of Kenya** and **rule 2 of Arbitration Rules 1997**, for an order that the suit be stayed pending the hearing and determination of arbitral proceedings.

Before the application filed in HCCC No. 535 of 2009 was heard, the High Court recorded the following order.

“By consent HCCC No. 536 of 2009 be argued as a test case. Ruling in HCCC 535 of 2009 to bind the current application in the file.”

The High Court heard the application on the merits. It is apparent that the 1st respondent did not object to the dispute being referred to arbitration. Rather, its objection was to the forum. It contended that the arbitral proceedings should be conducted in Kenya where the dispute had closest connection rather than in New Delhi in India.

By a ruling dated 2nd September, 2009 the High Court allowed the application for stay of proceedings to the extent that the arbitral proceedings be held in Kenya but under the Arbitration Act of India 1996. The High Court further ordered the parties to agree on a single arbitrator within fourteen days failure of which the Chairman of the Institution of Engineers of Kenya would appoint a single arbitrator to determine the dispute. The High Court ordered that the orders would apply in HCCC No. 535 of 2009.

On 26th May 2011 the appellant filed the present appeal in which it seeks orders, *inter alia*, that the ruling and orders of the High Court be reversed and be substituted with an order that the dispute be determined by arbitration to be held in India.

The appellant also filed Civil Appeal No. 103 of 2011 relating to HCCC No. 536 of 2009 against the same ruling and orders, which was heard and determined by the Court differently constituted on 30th May 2012. In that appeal, the Court, *inter alia*, ***“allowed the appeal, set aside the orders made by the High Court...”*** with costs to the appellant.

This appeal which relates to HCCC No. 535 of 2009 is against the same ruling and orders and seeks the same orders as Civil Appeal No. 103 of 2011. The 1st respondent has filed a notice of grounds for affirming the decision pursuant to Rule 94 of the Court of Appeal Rules 2010.

At the hearing of the appeal, Mr. Gachuhi learned counsel for the appellant brought to the attention of the Court that Civil Appeal No. 103 of 2011 has already been determined and submitted that the judgment determined all matters of fact and law, which were in dispute, and which are raised in Civil Appeal No. 102 of 2011. He contended that he could not withdraw the appeal as it relates to two suits but would be satisfied if the court makes an order that all issues in this appeal have already been determined in Civil Appeal No. 103 of 2011 in which case he would waive the costs of the appeal.

However, **Mr. Ombwayo** learned counsel for the 1st respondent submitted that the appeal be either be

withdrawn or be determined as the respondent has filed grounds for affirming the decision.

Thereupon, the appellant's counsel prosecuted the appeal and asked for the costs of the appeal. The respondent's counsel made replying submissions and argued the grounds for affirming the decision, in essence, asking the Court to depart from its decision in Civil Appeal No. 103 of 2011. He also asked for the costs of the appeal.

We have not found it necessary to set out in detail the respective submissions of the counsel, or to consider the appeal on the merits because in our view, all these proceedings are misconceived.

It would have been an efficient use of judicial resources and a better procedure, if the respective counsel had brought to the attention of the Court at the hearing of Civil Appeal No. 103 of 2011, that this appeal was also pending and sought an order of consolidation of the two appeals.

Two appeals were filed because the ruling of the High Court related to two suits. The subject matter of the application in each of the two suits was the same – stay of proceedings pending arbitration. The subject matter of the two appeals is, the ruling and orders of the High Court dated 2nd September, 2009. The respective counsel in this appeal have failed to appreciate the full impact of the judgment of the Court in Civil Appeal No. 103 of 2011, delivered three years ago.

The Judgment set aside the ruling and orders of the High Court with the result that the ruling and order were no longer subsisting at the time the present appeal came for hearing. The ruling and orders of the High Court, the subject matter of the appeal, having been set aside, the substratum of the appeal is no longer existing and the appeal has thus been overtaken by events. In the premises, proceeding with the appeal or seeking to affirm the decision of the High Court was an abuse of the process of the Court. The Court has inherent jurisdiction under Rule 1(2) Court of Appeal Rules to make any orders necessary for the ends of justice or to prevent abuse of the process of the Court.

As regards the costs of the appeal, the appellant was at fault for not withdrawing the appeal. The 1st respondent was equally at fault for insisting on prosecuting the grounds for affirming the decision. It is just that each party should bear its own costs of the appeal.

For the foregoing reasons, the appeal is struck out under the inherent jurisdiction of the Court with no orders as to costs.

Dated and delivered at Nairobi this 31st day of July, 2015.

E.M. GITHINJI

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

*I certify that this is a
true copy of the original*

DEPUTY REGISTRAR